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IN THE

Supreme Court of the United States

October Term 1953

No. 141

FAMOUS REALTY, Inc., a Corporation,
Petitioner,

—against—

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 15th, 1954

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Famous Realty, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (R. 79a)[1], reversing the judgment of the United States District Court for the Eastern District of New York (R. 63a).

OPINIONS BELOW

The opinion of the District Court (R. 53a-63a) is not yet reported. The opinion of the Court of Appeals is reported at 211 F. 2d 198.

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[1] The letter "R" refers to pages of the appendix to the brief for the Secretary of Labor, the Respondent here, in which the proceedings in the Court of Appeals are bound.

The letters "RP" refer to pages of the Appendix to the brief of Famous Realty, Inc., the Petitioner here.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1954 (R. 79a). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED

The Administrator of the Wage and Hour Division of the Department of Labor brought this suit under Sec. 17 of the Fair Labor Standards Act (29 U. S. C. A. Sec. 201 *et seq.*) to enjoin the Petitioner from alleged violations of the Act.

The question presented is:

Whether watchmen hired by the Petitioner, not itself engaged in the production of goods, for the sole purpose of looking for fires which may endanger the buildings owned by the petitioner and turn in alarms when any such fires are discovered, are engaged in the production of goods or in an occupation essential to the production of goods, or in interstate commerce, within the meaning of the Fair Labor Standards Act.

STATEMENT

In August of the year 1949 the Administrator of the Wage and Hour Division of the Department of Labor brought suit against the Petitioner to enjoin the Petitioner from violating the Fair Labor Standards Act by failing to pay certain of its employees for overtime and by failing to maintain required records as to wages, hours and conditions of their employment (R. 1a, *et seq.*). The answer of the Petitioner placed in issue the sole question

whether the affected employees come within the provisions of the Fair Labor Standards Act.

The Petitioner, a New York Corporation, is the owner of a tract of land in Brooklyn, New York, which contains approximately twenty buildings, a pier and a railroad right of way (R. 6a, 7a, 54a). The Petitioner does not use these buildings or other facilities for its own use but they are leased to various tenants who themselves operate and maintain the buildings and other facilities leased to them (RP 71a).

The Petitioner hires watchmen whose only duty is to watch for fires and if they discover any fires to turn in an alarm; they are not required to fight the fires; they are not required to keep trespassers off the premises; they are not required to guard the premises; all they do is watch for any fires (RP 69a, 70a). The watchmen render no services to the tenants (RP 66a, 68a, 71a), as a matter of fact the tenants who were called as witnesses by the Respondent on the trial testified that they had no knowledge of the watchmen hired by the Petitioner (RP 67a, 68a). One tenant testified that it maintained its own guarding service (RP 68a).

The testimony before the trial court further disclosed that the leases between the Petitioner and its tenants were uniform and provided that the landlord (the Petitioner here) is not required to furnish any services whatsoever to any building or any part thereof or any other facility contained on the petitioner's tract of land (R. 54a).

The watchmen were hired for one purpose and one purpose only, that is to reduce the fire insurance premiums payable by the Petitioner in connection with the buildings

and other facilities contained in the Petitioner's tract of land (R. 56a).

THE DECISION OF THE DISTRICT COURT

The District Court after a trial of the issues dismissed the complaint upon the ground that the watchmen were not engaged in the production of goods nor were they engaged in an occupation which was essential to the production of goods. The District Judge said:

> "The activities of the various tenants of this defendant are not dependent upon or indeed influenced directly by the presence of these watchmen who do not enter, and who might or might not observe a fire which started within their premises" (R. 59a).

The facts recited above were found by the District Court and no attack upon the findings was made by the Respondent in the Court of Appeals.

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals reversed the decision of the District Court and held that the watchmen were employees as defined by the Act. The gravamen of the decision of the Court of Appeals is found in the following language from the opinion:

> "Despite the limited services of these watchmen we cannot agree with the learned judge below that these men are not employees within the Act. What they do serves to safeguard the buildings from damage or destruction by fire and thus to keep them in suitable condition for use in the production of goods for commerce" (R. 76a-77a).

REASONS FOR GRANTING THE WRIT

I.

The proper administration of the Fair Labor Standards Act requires a review by this Court of the decision of the Court of Appeals. Here we have a case where a landlord says to a tenant "We will lease a building to you for your own use. You take care of it; you maintain it; you protect it. We offer you no services whatsoever." That same landlord then hires employees not for the use of the tenants—the tenants are even without knowledge of their existence—but for the landlord's own use, to effect a reduction in its fire insurance premiums. These employees render no services to the tenant, they don't even enter the premises occupied by the tenant. Under these facts the Court of Appeals held that these employees were engaged in commerce within the meaning of the Act simply because the tenants may be engaged in the production of goods for commerce. We submit that this Court never intended such a result when it decided *A. B. Kirschbaum Co.* v. *Walling* (316 U. S. 517), *Walton* v. *Southern Package Corp.* (320 U. S. 540, 88 L. Ed. 298) and *Borden Co.* v. *Borella* (325 U. S. 679, 89 L. Ed. 1865). Applying a simple test adds to the conviction that these employees are not employees within the meaning of the Act and were never meant to be either by the Congress or by this Court when it enunciated the rules contained in the three cases cited. Assume that the employment of these watchmen was terminated how would it affect the production of goods for commerce. The answer is that it would not. Further it could not since this was not a service for which the tenant had bargained and which was therefore supplied to the

tenant in aid of the tenant's production of goods for commerce. Emphasis is added by the fact that the tenants themselves were without knowledge of the existence of this watchmen service which was for the benefit of the landlord and the landlord alone.

The situation here is not an unusual one—on the contrary it is frequently found where a landlord leases an entire structure and relieves himself of the obligation to maintain the premises. Does that mean any employee of the landlord is an employee within the meaning of the Act if the tenant is engaged in an enterprise which is covered by the Act? The answer is obviously "No", unless that employee is required to render some service to the tenant which is in aid of the production of goods for commerce.

An analysis of the cases of this Court cited above, show their inapplicability to the present situation.

In *A. B. Kirschbaum Co.* v. *Walling* (*supra*), the employees involved in the action operated and maintained the building for the tenants. The conditions of the tenancies required the landlord to render these services to the tenants. The activities of these building service employees were held by this Court to be necessary for the production of goods for commerce since the tenants, serviced by these employees, were principally engaged in the production of goods for interstate commerce.

In sharp contrast to the *Kirschbaum* case this Court in *McLeod* v. *Threlkeld* (319 U. S. 491, 87 L. Ed. 1538), held that a cook for maintenance-of-way employees of an interstate railroad was not engaged in commerce and therefore not covered by the Act.

In *Walton* v. *Southern Package Corp.* (*supra*), the employee involved in the litigation was hired by an employer, itself engaged in interstate commerce, to aid in protecting the building, machinery and equipment from injury or destruction from fire or trespass.

In *Borella* v. *Borden Co.* (*supra*), the defendant itself was engaged in the production of goods for commerce and its employees, the plaintiffs therein, were its own building maintenance and custodial employees employed directly by the manufacturer to protect its own property.

II.

The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals of the 7th Circuit in *Mitchel* v. *Joyce Agency Inc.* (211 F. 2d 241), which was decided on March 29, 1954. In that case the defendant engaged in the business of furnishing watchmen, guard, detective, fire inspection and other services to a firm which itself was engaged in the ownership and operation of fourteen retail department stores. These stores were situated in more than one state and it was shown that the stores purchased goods from outside Illinois, the state in which its warehouses were situated. The defendant supplied guard or watchman services to the warehouse, to which these goods, purchased in other states, were delivered; and from which said goods were distributed to the stores outside the state of Illinois.

It was contended by the Labor Department that the warehouse employees were engaged in commerce and that the employees of the defendant, which furnished the guard, watchman, detective and fire inspection services for these

warehouses were engaged in a "closely related" process or occupation directly essential to such production within the meaning of the act and were therefore engaged themselves in producing goods for commerce.

Although the defendant admitted that some of the employees of the department store, employed in the warehouse, were involved in interstate commerce, the Court held that the fact disclosed affirmatively that none of the employees of the defendant, merely acting as watchmen, were engaged in commerce. In this case the employees involved rendered far greater service as watchmen than the employees involved in the instant proceeding—as shown above, the watchmen employed by the Petitioner did nothing except watch for fires and report them if they discovered any.

We further submit that the decision of the Court of Appeals, from which the Petitioner seeks a review, is contrary to the decision of the Court of Appeals for the 3rd Circuit in *Carrigan* v. *Providence Trust Co. of Philadelphia* (153 F. 2d 74).

In this latter case the plaintiff was employed by the defendant as a guard at one of its branch offices. In addition to his guard duties he tended fires, answered the telephone, cleaned and mopped. He brought an action for double compensation and for the other benefits prescribed by the Fair Labor Standards Act. It was not questioned that the defendant engaged in interstate commerce within the meaning of the Fair Labor Standards Act and was subject to the provisions of the Act. The Court of Appeals stated that "Only one question is involved here, namely,

is appellant 'engaged in commerce' within the meaning of the Fair Labor Standards Act" (p. 76). The Court said:

> "As the courts have consistently maintained, it is the work of the employee and not the nature of employers business that determines the applicability of the Act." (Citing cases.)
>
> • • • • •
>
> "But for a rather remote possibility that the law would be violated by a person or persons violently and forcefully breaking into the bank premises with the intent of robbery, or that some emergency should arise as a fire or leaky pipe, the watchman's services could have no effect upon commerce, and even then the effect of the watchman's acts would be negative and not acts in commerce. He had no hand whatever in the affirmative acts which constitute commerce. No act within the scope of the appellant's duty touches any facet of the acts of commerce in which the bank was engaged. The watchman's services were separate and distinct from any function of the bank which goes into the conception of interstate commerce" (p. 76).

In the instant case it is even more remote that the watchmen's services could have any effect upon commerce. There is no need to labor this point—it has been demonstrated above that the business of the tenants would go forward even if there were no watchmen, especially is this so since the tenants had no awareness of the existence of these watchmen.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

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June 15th, 1954

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 141

FAMOUS REALTY, INC., PETITIONER

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion, findings of fact and conclusions of law of the district court (53a-63a),[1] are unreported. The opinion of the Court of Appeals (73-75) is reported at 211 F. 2d 198.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1954 (75-76). The petition

[1] References are to the pages of the two appendices constituting the record in this Court.

for a writ of certiorari was filed on June 16, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTE INVOLVED

This case arises under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910; 29 U. S. C. 201 *et seq.*, the pertinent provisions of which are:

> SEC. 3 (63 Stat. 911). As used in this Act—
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.
>
> * * * * *
>
> SEC. 7 (63 Stat. 912). (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compen-

sation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 11 (52 Stat. 1066). * * * (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

QUESTION PRESENTED

Whether watchmen who render fire protection services to buildings and other facilities used by the tenants in the production of goods for interstate commerce are themselves engaged in the "production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended.

STATEMENT

The Secretary of Labor brought this action to enjoin petitioner from violating the Fair Labor Standards Act of 1938, as amended, by employing

night watchmen without compensating them for hours worked in excess of 40 in each workweek at time and one-half their regular rates of pay, as required by Section 7 of the Act, and by failing to keep proper wage and hour records with respect to these and other employees as required by Section 11(c) and the regulations issued pursuant thereto (2a-5a).

Petitioner is a New York corporation which owns a considerable parcel of land in Brooklyn fronting on the East River. Situated on the lands are approximately 20 buildings, some piers, sheds, and a railroad siding (6a, 7a, 54a, 74). These buildings and other facilities are leased to several different tenants, most of whom are engaged in commerce or in the production of goods for commerce (7a, 9a-16a, 48a, 55a, 75). As the trial court found, "It is undisputed that many of the tenants are engaged in interstate commerce or in the production of goods for interstate commerce" (55a).

Among these tenants are several warehousing concerns (7a) which receive goods from outside the State (15a, 48a), a trucking company (7a), a steamship company carrying freight between South America and the United States (7a), a manufacturer of candy-making machinery a substantial portion of which is shipped out of the State (7a, 9a-10a), and a chemical company (7a, 9a). It was either conceded by counsel for petitioner (9a-12a, 48a), or demonstrated by unchallenged testimony of representatives of the various tenants (12a-14a, 14a-15a, 15a-16a, 47a-48a), that each was engaged

either in the production of goods for commerce or in interstate commerce, or both, within the meaning of the Act (55a). As the Court of Appeals observed, "so many of [the tenants] are engaged in the production of goods for commerce that the buildings are to be treated as used for that purpose" (74).

The four night watchmen, around whom this controversy centers, are employed primarily for fire protection purposes (18a, 20a, 22a, 27a, 29a, 33a-34a, 39a, 56a, 74). Three of them work a full six-day 72-hour week while the fourth, who acts as a relief man, generally puts in a five-day 60-hour week (16a-17a). Admittedly, all of the watchmen are paid on a straight hourly rate basis for all hours worked, including those in excess of 40 a week (*id.*). Throughout the 12 hours that they are on duty each night the watchmen are required to be on the alert for fires that might endanger the buildings and other improvements on petitioner's property and, if any such fires are discovered, to turn in alarms. They are outside watchmen and have no duties inside the various buildings (23a, 56a). The activities of these watchmen result in a substantial reduction of petitioner's fire insurance costs (56a, 74).

The district court held that in watching for fires at night and from outside the buildings the watchmen "do not contribute materially or otherwise, to the consummation of transactions in interstate commerce which have their origin or are partly maintained in any of the said several buildings * * *" (56a-57a).

The court of appeals reversed (73-74), holding that the watchmen are "fairly within the category of custodial and maintenance employees * * * held to be within the statute [in] *Kirschbaum* v. *Walling*, 316 U. S. 517; *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Borden Co.* v. *Borella*, 325 U. S. 679," since "What they do serves to safeguard the buildings from damage or destruction by fire and thus to keep them in suitable condition for use in the production of goods for commerce" (74).

ARGUMENT

The decision of the court of appeals correctly applies the principles of this Court's decisions, and it is not in conflict with the decision of any other court of appeals. Further review is unnecessary.

1. In a consistent line of decisions, this Court has held the Fair Labor Standards Act applicable to custodial and maintenance employees guarding and servicing buildings and facilities used in the production of goods for commerce. *Arsenal Building Corp.* v. *Walling* and *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Borella* v. *Borden Co.*, 325 U. S. 679; *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Armour & Co.* v. *Wantock*, 323 U. S. 126; *Schulte Co.* v. *Gangi*, 328 U. S. 108. The grounds on which petitioner attempts to distinguish these decisions are wholly untenable. The main contention seems to be that petitioner is "not itself engaged in the production of goods" for commerce and that the watchmen hired to protect petitioner's buildings are not so engaged "simply because the tenants may be engaged in the production of goods for com-

merce." See petitioner's statement of question, Pet. 2, and Pet. 5. But in the leading cases decided by this Court (*Kirschbaum Co.* v. *Walling* and *Arsenal Building Corp.* v. *Walling, supra*), coverage was predicated on the fact that the *tenants* were engaged in the production of goods for commerce, the employer's business, as in the instant case, being simply to furnish or operate the premises. As this Court stated in its opinion in the *Arsenal Building* and *Kirschbaum* cases: "the provisions of the Act expressly make its application dependent upon the character of the employees' activities." 316 U. S. at 524. Therefore, it is of no significance that the business of petitioner, the employer here, is not in itself commerce or the production of goods for commerce.

Petitioner's emphasis on the fact that the watchmen here "don't even enter the premises occupied by the tenant" (Pet. 5) is equally without significance. This is hardly more than a restatement of the unsuccessful attempt in *Walton* v. *Southern Package Corp., supra*, 320 U. S. at 542, to distinguish the watchman in that case from the employees in the earlier cases on the ground that he was on duty only at night when no production was going on. Walton's "duties were to make hourly rounds of the plant, punch the nightwatchman's clocks at various stations on the plant, and report any fires and trespassers," 320 U. S. at 542. With the exception of the addition of "trespassers," these duties coincide precisely with those which even the petitioner admits the four night watchmen here perform (28a-29a, 45a-46a).

None of the above decisions holding watchmen to be within the coverage of the Act attach any significance to whether they are inside or outside, or daytime or nighttime, guards. The watchmen held covered in the *Arsenal Building* case apparently included some of the employees who watched only the outside of the buildings at night. See *Fleming* v. *Arsenal Bldg. Corp.*, 38 F. Supp. 207, 210 (S. D. N. Y.). And the fire guards in the *Armour* case, who "were not given access to the factory premises at night except by call or permission of the watchmen" (323 U. S. at 127), were held entitled to the benefits of the Act for "on call" duty, a service plainly no more substantial than that rendered by the watchmen here. Detection and reporting of fires is certainly as essential a part of protecting the tenant's buildings from fire as actually fighting the fires once discovered. Obviously, the two functions go hand in hand. There is no indication that the watchmen involved in the *Kirschbaum, Arsenal, Walton*, and other cases, did any more than the employees in the instant case.

2. The decision below is not in conflict with any decision of any other court of appeals. On the contrary it accords with a long line of decisions of several courts of appeals. *Walling* v. *Sondock*, 132 F. 2d 77 (C. A. 5), certiorari denied, 318 U. S. 772; *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5); *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4); *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (C. A. 10); *Bozant* v. *Bank of New York*, 156 F. 2d 787 (C. A. 2); *Baldwin* v. *Emigrant Industrial Savings Bank*, 150 F. 2d 524 (C. A. 2), certiorari de-

nied, 326 U. S. 767; *Fleming* v. *Post,* 146 F. 2d 441 (C. A. 2); *Roberg* v. *Henry Phipps Estate,* 156 F 2d 958 (C. A. 2); and *Grant* v. *Bergdorf & Goodman Co.,* 172 F. 2d 109 (C. A. 2).

Petitioner asserts that the decision below conflicts with *Mitchell* v. *Joyce Agency, Inc.,* 211 F. 2d 241 (C. A. 7), and *Carrigan* v. *Providence Trust Co. of Philadelphia,* 153 F. 2d 74 (C. A. 3). But both of those decisions rested on the assumption that no production of goods for commerce occurred on the premises involved, and that the only question was whether the guards were within the scope of the "in commerce" phase of the Act's coverage. Those decisions in no way conflict with the ruling in the instant case that guards are within the coverage of the Act where the premises guarded are admittedly used for the manufacture and processing of goods for commerce. On the contrary, to the extent that the *Joyce Agency* decision is pertinent to the issue decided by the decision below in the instant case, the two decisions are in accord. For the *Joyce* decision sustains coverage for the watchmen there involved who protected a building conceded to be used in the production of goods for commerce (211 F. 2d at 244). The remainder of the *Joyce* decision held that the handling of goods in connection with their receipt into and distribution from warehouses is not "production" within the meaning of the Act, and that the watchmen were not within the scope of the "in commerce" phase of coverage unless they had physical contact with goods moving in com-

merce.[2] The *Joyce* decision explicitly distinguished cases involving guards at buildings used in the "production of goods," on the ground that "we find there was no production of goods for commerce carried on in the * * * warehouses". 211 F. 2d at 246. The buildings in the instant case on the other hand were admittedly used in the production of goods for commerce and the decision below rested solely on this basis of coverage.

The *Carrigan* case also involved solely the "in commerce" phase of coverage. As the decision expressly states, it was "admitted that appellee bank did not produce goods," and thus the case was decided on the premise that "only one question is involved here, namely, is appellant 'engaged in commerce' " (153 F. 2d at 75).

---

[2] A petition for certiorari has been filed by the Government in the *Joyce Agency* case (No. 230, October Term, 1954), on the grounds that the decision of the Seventh Circuit conflicts with the decisions of other circuits with respect to the coverage of watchmen under the "in commerce" phase of the Act's coverage, and that it is inconsistent with this Court's decisions and the decisions of other courts of appeals in its construction of what constitutes "production of goods" within the statutory definition. The petition for certiorari filed in the *Joyce* case, while asserting conflicts with a number of other decisions, does not assert any conflict with the *Famous Realty* decision here involved for the simple reason that these two decisions, while apparently inconsistent in result, do not conflict directly because of differences in the courts' factual assumptions.

CONCLUSION

The decision below is correct and there is no conflict. Accordingly, we oppose the issuance of the writ.

Respectfully submitted,

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JULY 1954.

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